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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

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| JANE FENG,<br>Plaintiff and Appellant,<br>v.<br>ARTHUR J. LIU,<br>Defendant and Respondent. | A146991<br><br>(San Mateo County<br>Super. Ct. No. CIV 530458) |

Plaintiff Jane Feng appeals in propria persona (pro. per.) from a judgment entered after the trial court sustained a demurrer without leave to amend. Because plaintiff's failure to provide this court with an adequate record precludes appellate review, we shall dismiss the appeal.

## BACKGROUND

The appellate record provided to this court contains very few items. The appeal is taken from a judgment after the court sustained a demurrer to plaintiff's first amended complaint without leave to amend. While the record contains a copy of the first amended complaint and a copy of the judgment, there is little else in the record that bears upon the appeal. The record does not include a copy of the demurrer or any opposition to the demurrer filed by plaintiff.[1] Nevertheless, based on the few documents in the record

[1]The appellate record does include opposition papers filed by plaintiff in response to an *earlier* demurrer but the previous demurrer itself is not included in the record. We note that plaintiff supplied various "exhibits" to this court along with her opening and reply brief. Because the exhibits are not part of the record on appeal and do not appear to

together with the trial court's register of actions, we can put together a few of the pieces of the puzzle to give some context to this appeal.

Plaintiff and her son were in a vehicle that was rear-ended by another vehicle as the son, who was driving, stopped at a red light. Plaintiff sued the driver of the vehicle that hit their car. The driver of the other car filed a cross-complaint against plaintiff's son in which the driver alleged that plaintiff's son caused the accident by stopping without warning at a yellow light. Plaintiff retained an attorney, David Yang, to represent her and her son. After Yang withdrew from the case, plaintiff and her son retained attorney Arthur J. Liu, the defendant in this case, to represent them in a mediation scheduled for August 2010. Plaintiff paid defendant $2,100 for his services. According to plaintiff, defendant promised to defend against the cross-complaint in the mediation but did not do so. The parties reached a settlement at the mediation in which State Farm Insurance Company (State Farm), as insurer for the driver who rear-ended plaintiff and her son, agreed to pay $20,000 to plaintiff and $5,000 to her son. The settlement resolved all the claims between the parties.

Plaintiff initially sued defendant and State Farm in San Mateo County Superior Court case no. CIV 530458. Although the appellate record is not sufficient to adequately summarize the original suit against defendant and State Farm, plaintiff described the earlier case as one in which she alleged that defendant conspired with State Farm to coerce her and her son to accept the settlement of the auto accident litigation. According to defendant, the first lawsuit plaintiff filed against him ended with a judgment in his favor in 2014. He described the first lawsuit as a malpractice action.

Plaintiff filed a second suit against defendant in pro. per. in September 2014. It is the second suit against defendant that gives rise to this appeal. In the operative first amended complaint, plaintiff alleges that defendant defrauded her by failing to defend

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have been filed or lodged in the trial court, we shall disregard them. (See Cal. Rules of Court, rule 8.244(d), 8.155(a)(1)(A).) The exhibits do not, in any event, fill the gaps in the record and instead consist of things such as a police report and various pleadings or portions of pleadings filed in earlier litigation.

against the cross-complaint in the mediation conducted in the auto accident litigation. She claims that he accepted $2,100 in exchange for defending against the cross-complaint on behalf of her and her son. Among other things, she alleges that he accepted the case knowing that it was "almost unrepairable" after the first attorney withdrew. She asserts that she and her son have limited English language skills and only became aware of the fraud committed by defendant when they received various documents in 2013 from defendant and their original attorney, Yang, whom they also sued.

The register of actions reflects that defendant filed a demurrer to the first amended complaint in April 2015. The register further reflects that the court sustained the demurrer without leave to amend in an order filed on October 30, 2015. An entry in the register of actions states that the demurrer was sustained on two separate grounds. First, the judgment in the earlier action against defendant bars the first amended complaint for fraud on res judicata grounds. Second, the fraud action is barred by the three-year statute of limitations because plaintiff was aware of the basis for the fraud claims no later than October 6, 2010. Following entry of judgment in favor of defendant, plaintiff timely appealed.

## DISCUSSION

On appeal, plaintiff argues that the trial court erred in sustaining the demurrer on res judicata and statute of limitations grounds. She contends that the current case against defendant is "completely different" from the earlier case she filed against defendant. She also disputes the conclusion that her fraud cause of action is time-barred, claiming that a declaration she signed on October 6, 2010 does not show that she had any knowledge of defendant's alleged fraudulent behavior at that time.

We apply two separate standards of review when considering a trial court order sustaining a demurrer without leave to amend. (*McClain v. Octagon Plaza, LLC* (2008) 159 Cal.App.4th 784, 791.) First, we apply de novo review in assessing whether the trial court erred as a matter of law in sustaining the demurrer. (*Ibid.*) If the facts as pleaded do not state a cause of action, we then consider whether the court abused its discretion in denying leave to amend the complaint. (*Id.* at pp. 791–792.)

As we explain, in this case the lack of an adequate record precludes us from considering whether the court erred in sustaining the demurrer. It is a fundamental rule of appellate review that we presume the judgment to be correct and indulge all intendments and presumptions to support it regarding matters as to which the record is silent. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; accord, *Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.) An appellant bears the burden of overcoming the presumption of correctness by providing an adequate record that affirmatively demonstrates error. (See *Defend Bayview Hunters Point Com. v. City and County of San Francisco* (2008) 167 Cal.App.4th 846, 859–860.)

The failure to provide this court with an adequate record not only fails to satisfy an appellant's burden to demonstrate error, it also precludes review of any asserted error. (See *Estate of Fain* (1999) 75 Cal.App.4th 973, 992 [appellant who supplies no reporter's transcript is precluded from challenging sufficiency of the evidence]; *In re Angel L.* (2008) 159 Cal.App.4th 1127, 1136–1137 [court presumes evidence supports judgment when record of pertinent oral proceedings is not provided].) Inadequacy of the record may warrant dismissal of an appeal. (*In re Marriage of Wilcox* (2004) 124 Cal.App.4th 492, 498; *Ehman v. Moore* (1963) 221 Cal.App.2d 460, 463 ["Where the appellant fails to provide the reviewing court with a record enabling it to review and correct alleged errors the appeal will be dismissed."].)

Here, the record is patently inadequate to address plaintiff's contentions. In assessing whether a judgment in an earlier lawsuit has res judicata effect, we consider whether it is premised on the same "primary right" as a cause of action asserted in a later lawsuit. (See *Estate of Dito* (2011) 198 Cal.App.4th 791, 801.) The record provided to this court does not permit us to make such an assessment. The appellate record does not include a copy of the demurrer or the prior judgment the trial court concluded has a preclusive, res judicata effect. Without a record that includes the prior judgment, we simply have no basis to overturn a ruling that is premised on the content of that prior judgment.

We also lack a record sufficient to consider plaintiff's contentions as they relate to the application of the statute of limitations. As we understand the trial court's order, the three-year statute of limitations began to run no later than October 6, 2010, because a declaration signed by plaintiff on that date reflects her awareness of the grounds for a fraud claim against defendant. That declaration is not contained in the record.[2] Accordingly, the record is inadequate to consider plaintiff's contentions.

Under the circumstances presented here, dismissal is warranted for lack of an adequate record to permit appellate review. The inadequate record does not permit us to reach the merits of plaintiff's claims. We are aware that plaintiff brings this appeal without the benefit of legal representation, but her status as a pro. per. litigant does not exempt her from the rules of appellate procedure or relieve her burden on appeal. (See *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246–1247.) We treat pro. per. litigants like any other party, affording them " 'the same, but no greater consideration than other litigants and attorneys.' " (*Id.* at p. 1247)

**DISPOSITION**

The appeal is dismissed. Respondent shall be entitled to recover his costs on appeal.

[2]We note that there is a declaration attached to plaintiff's opening brief on appeal bearing a date of October 6, 2010, but that declaration was not included in the record on appeal and cannot be attached to a brief or considered by this court unless it is properly part of the record. (See Cal. Rules of Court, rule 8.244(d).) Even if we were to consider the declaration submitted with the opening brief, it supports the trial court's conclusion as it relates to the running of the statute of limitations. Her declaration shows that she knew as of the date of the declaration that defendant purportedly failed to defend against the cross-complaint in the auto accident litigation despite taking her money and agreeing to provide a defense. That is, in essence, the basis for her fraud claim, which was required to be filed within three years. (Code Civ. Proc., § 338, subd. (d).)

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McGuiness, P.J.

We concur:

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Siggins, J.

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Jenkins, J.

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